Supreme Court, U.S.
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In The

# Supreme Court of the United States

CHRISTOPHER PAUL SCHNEIDER,

*Petitioner,*

v.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Virginia**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the admission of Christi Schneider's preliminary hearing testimony violate Petitioner's Sixth Amendment right to confront the witnesses against him?

## LIST OF PARTIES

The petitioner is Christopher Paul Schneider, who was convicted of rape in violation of Va. Code Ann. § 18.2-61 (1999). The respondent is the Commonwealth of Virginia.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS WHY THE WRIT SHOULD BE GRANTED | 5 |
| I. The Admission of Christi Schneider's preliminary hearing testimony violated Petitioner's Sixth Amendment right to confront the witnesses against him | 5 |
| A. The nature and scope of preliminary hearings do not allow for the full and fair cross examination necessary to satisfy the requirements of the Confrontation Clause | 6 |
| B. Since *Crawford* was decided, a split has emerged among the states regarding whether preliminary hearing testimony satisfies *Crawford's* requirement of cross examination | 9 |
| C. Christi was not "unavailable" to testify at trial | 11 |
| D. The Court should adopt a uniform standard for determining when a witness is "unavailable" | 14 |
| CONCLUSION | 15 |

## TABLE OF AUTHORITIES

Page

CASES

*Barber v. Page*, 390 U.S. 719 (1968) ..... 5, 6, 11, 14

*California v. Green*, 399 U.S. 149 (1970) ..... 6

*Crawford v. Washington*, 541 U.S. 36 (2004) ..... *passim*

*Longshore v. Commonwealth*, 530 S.E.2d 146 (Va. 2000) ..... 11

*Maryland v. Craig*, 497 U.S. 836 (1990) ..... 13

*Mattox v. United States*, 156 U.S. 237 (1895) ..... 6, 14

*Ohio v. Roberts*, 448 U.S. 56 (1980) ..... 9

*People v. Fry*, 92 P.3d 970 (Colo. 2004) ..... 7, 10

*Schneider v. Commonwealth*, 625 S.E.2d 688 (Va. Ct. App. 2006) ..... 11

*State v. Dunn*, 359 N.W.2d 151 (Wis. 1984) ..... 10

*State v. Henderson*, 136 P.3d 1005 (N.M. Ct. App. 2006) ..... 10, 11

*State v. Stuart*, 695 N.W.2d 259 (Wis. 2005) ..... 7, 9, 10

*United States v. Oliver*, 626 F.2d 254 (2d Cir. 1980) ..... 12

VIRGINIA CODE

§ 18.2-61 ..... 2

§ 18.2-457 ..... 12

RULES OF THE VIRGINIA SUPREME COURT

3A:11 ..... 7

7C:5 ..... 7

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Sixth Amendment ..... 1, 2, 5

OTHER AUTHORITY

28 U.S.C. § 1257 ..... 1

## PETITION FOR WRIT OF CERTIORARI

Christopher Paul Schneider (hereinafter "Schneider" or "Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Virginia, which held that Schneider's Sixth Amendment right to confront the witnesses against him was not violated by the introduction at trial of the preliminary hearing testimony of his accuser, Christi Schneider (hereinafter "Christi").

## OPINIONS BELOW

The Court of Appeals of Virginia held that Petitioner's Sixth Amendment right to confront the witnesses against him was not violated by admitting the preliminary hearing testimony of Christi Schneider at trial. The court's opinion is reprinted in the Appendix at App. 1. By order dated August 1, 2006, the Supreme Court of Virginia refused Schneider's petition for appeal. That order is reprinted in the Appendix at App. 14.

## JURISDICTION

The order of the Supreme Court of Virginia refusing Schneider's petition for appeal was entered on August 1, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"

## STATEMENT OF THE CASE

Christopher Paul Schneider was charged with one count of rape in violation of Va. Code Ann. § 18.2-61 (1999). On October 3, 2002, a preliminary hearing was held in the Juvenile and Domestic Relations District Court of the City of Virginia Beach. At the hearing, the Commonwealth called Christi Schneider, the accuser and Schneider's stepdaughter, as its only witness. Christi was sworn in and proceeded to testify regarding the alleged rape. Defense counsel was allowed to cross examine Christi. After considering the evidence, the court certified the case. Preliminary Hearing Transcript (P/H Tr.) at 19:4.

A bench trial was held on December 3, 2002, in the Circuit Court of the City of Virginia Beach. The Commonwealth called Christi as its first witness. Trial Transcript (T. Tr.) at 15:1-3. She was sworn in and answered several questions regarding her name, age, and background. T. Tr. at 15:1-16:4. However, when questioned about the rape allegation, Christi refused to testify. She stated that she would not testify because "I cannot handle it mentally, I don't think I'm capable of handling it." T. Tr. at 17:17-18. Christi explained that "[i]t's stressful, and I just – it's just hard; and I'm not going to do it." T. Tr. at 17:20-21. When asked why she couldn't handle the stress, Christi responded "[i]t's because I'm just going through a lot of stuff right

now, and this is just one thing I cannot handle and – ." T. Tr. at 18:1-3. Elaborating on her statement that she was "going through a lot of stuff right now," Christi testified about living without her mom and brother, living in a new home with someone she had not known for a long time, and attending a new school. T. Tr. at 18:4-19:12. She admitted to being hospitalized for mental health issues when she was nine but denied having been diagnosed with any stress-related disorders. T. Tr. at 20:21-21:5.

The Commonwealth asked the trial court to order Christi to testify, which it did. T. Tr. at 22:18-19. However, Christi again refused. T. Tr. at 22:19-20. Immediately thereafter, the Commonwealth, obviously aware before trial that Christi was going to refuse to testify, moved the court to declare Christi unavailable and to admit her prior testimony from the preliminary hearing. T. Tr. at 23:10-23. The Commonwealth stated:

> Your Honor, at this point the Commonwealth is going to request the court to declare Miss Schneider's testimony unavailable. She has made it clear that despite the court order, she refuses to testify. The Commonwealth has done everything possible. We have gotten her here. I have met with her in advance. I have explained, as the court could see from her testimony, . . . what the consequences of not testifying about her stepfather's actions would be; and yet she still continues to refuse.

T. Tr. at 22-23:9. The Commonwealth then referred the trial court to various Virginia Supreme Court opinions which it argued supported its assertion that Christi should be declared unavailable and that her preliminary hearing testimony be admitted. T. Tr. at 23:10-24:1. Defense

counsel, caught completely off guard, stated that "[t]hese are the [cases] that [the Commonwealth] gave me this morning, Your Honor. I have not reviewed these, but I would like to respond to what she stated." T. Tr. at 24:2-5. He continued: "[S]ince the preliminary hearing, a lot of stuff has come to light that I need to have answered by the witness and – with reference to her direct examination. And since she is not testifying, I – there's many more things that can come out that was not known to me at the time of preliminary hearing that I need to be able to ask; and I do not feel that it would be fair to the defendant to allow that testimony of the preliminary hearing in by itself without being able to cross-examine her." T. Tr. at 24:11-23.

The court recessed in order to review the preliminary hearing transcript and to allow defense counsel to review the cases relied upon by the Commonwealth. T. Tr. at 25:6-11. The court ordered that Christi be placed in lockup while the court was in recess in order to "give her a chance to reflect upon what she's done." T. Tr. at 25:20-21. Approximately 30 minutes later, the court reconvened. Christi still refused to testify. T. Tr. at 26:13-23.

Defense counsel again objected to admitting the preliminary hearing testimony noting that Christi appeared to be very strong-willed, did not appear fearful of anybody or anything, and had apparently just decided not to testify. T. Tr. at 27:15-19. He also continued to argue that "it's very important that I be able to cross-examine her." He explained: "We have contradictory evidence as to what she's told in the preliminary hearing, and I need to be able to impeach her and to ask her questions about other people's statements as to what she's told them; and I can't do that – or it's going to be difficult to do that without

her testifying today." T. Tr. at 27:23-28:5. Nevertheless, the trial court granted the Commonwealth's motion to declare Christi unavailable and admitted the transcript of Christi's testimony from the preliminary hearing. T. Tr. at 29:1-21.

The court found Schneider guilty of rape. The record reflects that the court's finding of guilt was based almost exclusively on Christi's testimony. T. Tr. at 114:12-15. At Schneider's sentencing hearing, defense counsel moved the court to set aside the finding of guilt on the ground that admitting Christi's testimony from the preliminary hearing violated Schneider's Sixth Amendment right to confront the witnesses against him. Sentencing Transcript (S. Tr.) at 4:1-8. That motion was denied and Schneider was sentenced to twenty-five years in prison, all but twelve years suspended, supervised probation for twenty-five years, and ordered to report as a registered sex offender pursuant to the Code of Virginia. S. Tr. at 76:19-77:11.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. The admission of Christi Schneider's preliminary hearing testimony violated Petitioner's Sixth Amendment right to confront the witnesses against him.

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right "is basically a trial right." *Barber v. Page*, 390 U.S. 719, 725 (1968). Testimonial statements of witnesses who do not appear at trial are barred unless "that witness was

unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

### A. The nature and scope of preliminary hearings do not allow for the full and fair cross examination necessary to satisfy the requirements of the Confrontation Clause.

The "primary object" of the Confrontation Clause is to prevent evidence from being used against a defendant without the defendant having the opportunity to cross examine the witness. Cross examination serves "not only . . . [to test] the recollection and [to sift] the conscience of the witness, but [to compel] him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). It is, as the Court has stated, "the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

The Court has recognized that "[a] preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial." *Barber*, 390 U.S. at 725. Additionally, one of the main objectives of the Confrontation Clause, to allow the fact finder to observe the witness and to weigh his or her demeanor, *see, Mattox*, 156 U.S. at 242-43, is entirely absent in a preliminary hearing which is typically held in a different court and before a different judge than the actual trial. For these reasons, some state courts have excluded preliminary

hearing testimony even when the witness is unavailable to testify at trial. *See*, *e.g.*, *State v. Stuart*, 695 N.W.2d 259, 265 (Wis. 2005) (finding that because cross examination at preliminary hearings tests "plausibility, not credibility," the opportunity to cross examine at that time does not satisfy *Crawford*); *People v. Fry*, 92 P.3d 970 (Colo. 2004) (finding that because of the limited nature of preliminary hearings in Colorado, the d fendant does not enjoy adequate motive or opportunity to cross examine during preliminary hearings).

Moreover, in states such as Virginia that allow for extremely limited discovery prior to the preliminary hearing, the ability to cross examine a witness at trial rather than during the preliminary hearing is particularly important. In Virginia, the only discovery available to an accused prior to the preliminary hearing is the ability to hear, inspect, or copy "any relevant written or recorded statements made by the accused . . . to any law enforcement officer," and "any criminal record of the accused." Rule 7C:5 of the Rules of the Supreme Court of Virginia. The result of this limited discovery is that the preliminary hearing is often the first look a defendant, and his attorney, has at the evidence against him or even the true nature of the case. Therefore, any opportunity a defendant or defense counsel may have to cross examine a witness at that time is handicapped by an obvious inability to prepare adequately for that examination. Following the preliminary hearing, however, the defendant is entitled to expanded, albeit still quite limited, discovery. *See*, Rule 3A:11 of the Rules of the Supreme Court of Virginia. Further, information garnered during the preliminary hearing, through the discovery process, or independent investigation often yields evidence which calls into question

the evidence presented against the defendant during the preliminary hearing. That new information may include evidence which discredits testimony given by witnesses during the preliminary hearing. Because that information was not known to the defendant or his attorney during the preliminary hearing, the witness could not be cross examined on that point. If the preliminary hearing testimony is admitted as evidence at trial, the witness can avoid cross examination on those points altogether. Not only is the defendant deprived of his opportunity to confront the witness regarding the new information, the fact finder is deprived of its opportunity to observe the witness's demeanor when presented with the new information; therefore, the fact finder cannot adequately ascertain the witness's credibility.

This concern is clearly illustrated in the present case. Following the preliminary hearing, defense counsel became aware of evidence that called into question Christi's testimony during the preliminary hearing. It was revealed that Christi had made similar accusations against Petitioner and another man three times before but had recanted each time. T. Tr. at 46:6-9, 91:24-92:7. Further, defense counsel uncovered a witness, Sheila Richards, Christi's mother's best friend, who testified at trial that Christi bragged to her two weeks after the alleged rape that she had "set him up" and that she had voluntarily performed oral sex on the Petitioner on the night of the alleged rape. T. Tr. at 84:8-14, 87:6-14, 88:17-22. Although this testimony was presented at trial, by refusing to testify, Christi avoided ever having to answer any questions regarding this new evidence and avoided having her prior testimony impeached. The trier of fact, in this case the judge, did not have the opportunity to observe Christi's

demeanor when faced with this new evidence and therefore could not properly judge her credibility.

Finally, allowing preliminary hearing testimony to be admitted in lieu of actual testimony at trial sets a dangerous precedent ripe for abuse. Witnesses, or even some unscrupulous prosecutors, may use this as a trial strategy in order to avoid having prior testimony impeached or having to answer to evidence uncovered after the preliminary hearing. At a minimum, the Court should limit the admissibility of preliminary hearing testimony to cases where the witness, due to death or some other meritorious reason, is truly unavailable at trial. Such testimony should be barred in cases, like the present one, where the witness simply refuses to testify.

### B. Since *Crawford* was decided, a split has emerged among the states regarding whether preliminary hearing testimony satisfies *Crawford's* requirement of cross examination.

In *Crawford,* the Court interpreted the Confrontation Clause to require a showing of unavailability of the witness and a prior opportunity for cross examination. Since that decision, a split has emerged among the courts of various states as to whether testimony given during a preliminary hearing satisfies *Crawford's*, and the Confrontation Clause's, requirement of cross examination.

The Supreme Court of Wisconsin considered the issue in *State v. Stuart*, 695 N.W.2d 259 (Wis. 2005). The Court reversed its prior holding in the case, decided under the reliability analysis of *Ohio v. Roberts*, 448 U.S. 56 (1980), and found that the defendant's cross examination of the witness during the preliminary hearing was insufficient to

satisfy his right of confrontation as interpreted by *Crawford*. *Id.* at 265. The Court based its decision on the limited nature of cross examination during preliminary hearings. *Id.* at 265-66. The Court noted that "the preliminary hearing 'is intended to be a summary proceeding to determine essential or basic facts' relating to probable cause, not a 'full evidentiary trial on the issue of guilt beyond a reasonable doubt.'" *Id.* at 266 (quoting *State v. Dunn*, 359 N.W.2d 151 (Wis. 1984)). The Court further noted that any cross examination attacking the "general trustworthiness" of a witness is "off limits" during a preliminary hearing. *Id.* (citations omitted). Similarly, since the Court's decision in *Crawford*, the Supreme Court of Colorado has affirmed previous decisions of that court holding that cross examination during preliminary hearings does not satisfy the requirements of the Confrontation Clause. *People v. Fry*, 92 P.3d 970 (Colo. 2004).

However, in *State v. Henderson*, 136 P.3d 1005 (N.M. Ct. App. 2006), the Court of Appeals of New Mexico declined to follow the example set by Wisconsin and Colorado.[1] The court concluded that "the admission of a 'testimonial' statement given by a witness under oath in a preliminary hearing does not violate the Confrontation Clause under Crawford where: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross examine." *Id.* at 1010. Because the defendant was given an opportunity to cross examine the statements

[1] The Court of Appeals stated that it believed its decision was "not contrary" to those decisions because both *Stuart* and *Fry* relied upon the limited nature of the applicable procedural rules governing preliminary hearing testimony to find that *Crawford* had not been satisfied. *Id.*

made during the preliminary hearing, that testimony satisfied *Crawford* and the Confrontation Clause. *Id.* at 1010-11. This is essentially the same rationale relied upon by the Court of Appeals of Virginia in the present case. The court found that Virginia law regarding the admissibility of preliminary hearing testimony has always required both unavailability and an opportunity for cross examination. *Schneider v. Commonwealth*, 625 S.E.2d 688, 613 (Va. Ct. App. 2006) (citing *Longshore v. Commonwealth*, 530 S.E.2d 146, 146 (Va. 2000)). Thus, under both New Mexico and Virginia law, *Crawford* is satisfied so long as the defendant had the opportunity for cross examination during the preliminary hearing. Neither state requires a showing that the opportunity for cross examination was adequate.

Because there is a split among the states regarding whether *Crawford* precludes the admission of preliminary hearing testimony, guidance is needed from the Court in order to resolve this conflict. The Court should resolve the conflict by holding that cross examination during preliminary hearings does not satisfy the Confrontation Clause's cross examination requirement as outlined in *Crawford*.

### C. Christi was not "unavailable" to testify at trial.

Even assuming that cross examination of a witness during a preliminary hearing satisfies the requirements of the Confrontation Clause, that testimony is only admissible when that witness is unavailable to testify at trial. *Barber*, 390 U.S. at 725-26. Christi Schneider was not "unavailable" at trial. Not only did she appear, but she answered several questions regarding her name, age, and

background. It was only after the questioning turned to her allegations against the defendant that she refused to testify.

The court had various tools, including contempt, that it could have used to convince Christi to testify. It used none of them. Holding reluctant witnesses in contempt is perhaps the strongest tool a court has at its disposal for compelling a witness to comply with the court's order to testify. Witnesses who refuse to comply with an order to testify can be held in custody until they agree to testify. *See*, Va. Code Ann. § 18.2-457 (1999) (authorizing imprisonment upon finding of contempt). The trial court in this case merely asked Christi to testify and, when she refused, placed her in solitary confinement for approximately 30 minutes. The court did not even inform Christi of the possible consequences of refusing to testify. Christi testified that she believed the worst that would happen is that she would be fined or sent to a juvenile detention center. T. Tr. at 21:14-23. She did not indicate that she knew the length of incarceration she may face if found in contempt. Virginia Code § 18.2-457 allowed the court to confine Christi for up to ten days upon a finding that she was in contempt. If she still refused to testify, she could have been found in contempt again and been confined for an additional period. Faced with this knowledge, it is possible that Christi would have agreed to testify. *See, United States v. Oliver*, 626 F.2d 254, 261 (2d Cir. 1980) (stating that "[i]t is always possible that a recalcitrant witness who does not respond to judicial pressure will testify when ordered to do so rather than face contempt proceedings for refusal to obey the court's order"). Further, it is possible that had Christi actually been placed in custody for any

meaningful period of time she would have reconsidered her refusal to testify.

The court had other options, short of incarceration, that it could have used to compel Christi to testify. Had the court inquired further into the reasons for Christi's refusal, it is possible that some arrangement could have been made that would have alleviated Christi's concerns and may have satisfied Petitioner's constitutional rights. While not all substitutes for face-to-face confrontation will suffice, this Court has approved, for example, the use of testimony via close circuit television in cases involving child victims of abuse. *Maryland v. Craig*, 497 U.S. 836 (1990). Although Christi, who was seventeen at the time of trial, is not a young child, *Craig* is instructive because it illustrates one option available to courts when a witness cannot testify because a face-to-face confrontation with the accused would be too traumatic.

Christi Schneider was not "unavailable" to testify. She was present during the trial and even took the stand and answered questions regarding her name, age, and background. She refused to testify, however, regarding the allegations she had made against the petitioner. The record reflects that Christi's decision was her own and that it was not the result of any threats to her safety or the assertion of any privilege. Rather, her refusal was based entirely on her belief that testifying was "stressful, and I just – it's just hard; and I'm not going to do it." The court did little to inquire as to the reasons for her refusal or to compel her testimony. Instead, the court merely accepted Christi's decision and found her to be unavailable. Prior to making this determination, however, the court should have explored the various options available to it including holding Christi in contempt or, if Christi could

not be convinced to testify under normal conditions, fashioning an arrangement that would have permitted Christi to testify while preserving Petitioner's rights to confrontation and cross examination of the witnesses against him.

### D. The Court should adopt a uniform standard for determining when a witness is "unavailable."

Although the Court has held that the Confrontation Clause demands a showing of unavailability before prior testimonial statements can be admitted at trial, *Crawford*, 541 U.S. at 68, it has never stated the standard by which courts should determine unavailability. The Court appears to have based its determination of unavailability on a case-by-case basis, never actually articulating a governing standard. *See, Mattox*, 156 U.S. at 244 (unavailability established where witness died prior to trial); *Barber*, 390 U.S. at 724-25 (unavailability not established where prosecutor made no "good faith effort" to obtain incarcerated prisoner's presence at trial). The Court should clarify exactly how courts are to determine unavailability and should adopt a clear standard for making that determination.

## CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER PAUL SCHNEIDER

*Of Counsel*

October 27, 2006

*Schneider v. Commonwealth*,
47 Va. App. 609, 625 S.E.2d 688 (2006)

IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT CHESAPEAKE, VIRGINIA

CHRISTOPHER PAUL SCHNEIDER

v.

COMMONWEALTH OF VIRGINIA

Record No. 0628-05-1
Decided: February 7, 2006*

Present: Judges Elder, Clements and Haley

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, A. Bonwill Shockley, Judge

*Affirmed.*

COUNSEL

Brandon H. Zeigler (Wolcott Rivers Gates, on brief), for appellant.

Susan L. Parrish, Assistant Attorney General (Judith Williams Jagdmann, Attorney General; Denise C. Anderson, Assistant Attorney General, on brief), for appellee.

OPINION

HALEY, J. – The sole issue here for determination is whether the trial court erred in finding a witness was "unavailable" and in consequently admitting into evidence a transcript of her preliminary hearing testimony at trial. Finding no error, we affirm appellant's conviction of a violation of Code § 18.2-61.

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* [Editor's Note: Appealed to the Supreme Court of Virginia]

## I.

Appellant was charged with raping his stepdaughter, C.S., in violation of Code § 18.2-61. At the October 3, 2002 preliminary hearing in the juvenile and domestic relations district court, the Commonwealth called only C.S. to testify. She stated that on April 25, 2002, while her mother was away from the house on an errand, appellant called her upstairs to his bedroom, fondled her, ordered her to take off all of her clothes, and had sexual intercourse with her. Because this pattern had occurred in the past, C.S. testified, she made efforts to preserve physical evidence of the encounter. She then ran to a neighbor's house and called her therapist, who called the police. After the Commonwealth completed its direct examination, appellant's counsel (who represented appellant at both the preliminary hearing and at trial) cross-examined C.S. Two rounds of re-direct and re-cross examination took place during the preliminary hearing. At the close of the hearing, the court certified the case.

During appellant's trial on December 3, 2002, the Commonwealth called C.S. to testify. C.S. was age 17 at the time. She answered background questions but refused to testify further once the topic turned to appellant. The Commonwealth reminded her that she was under a subpoena, but she still would not talk about the rape. C.S. said she did not "feel comfortable testifying," that she could not "handle it mentally," and that she was "going through a lot of stuff right now." After exploring her mental diagnoses and living situation, the Commonwealth asked if C.S. was aware of the consequences of refusing to testify. C.S. responded that possible punishments included fines and being sent to a detention home, but still would not testify.

At this point, the Commonwealth asked the trial court to order C.S. to testify. The trial court impressed upon her the seriousness of the charge, and then ordered her to testify. C.S. declined to follow the order, and the Commonwealth immediately moved to admit the preliminary hearing testimony into evidence. The court recessed to consider the Commonwealth's arguments, review the case law, and allow appellant's counsel to consider counter-arguments. During this approximately half hour recess, C.S. was placed in the lockup in an attempt to change her mind. After the break, C.S. still refused to testify, and both sides declined to ask her questions. After hearing the additional argument of counsel, the trial court found that C.S. was unavailable and admitted her preliminary hearing testimony.

The bench trial continued, including the testimony of Connie Andrews, a sexual assault nurse examiner. Andrews collected a sample of a dried substance from C.S.'s stomach, which was the evidence C.S. preserved from the encounter. An analysis of the sample revealed it to be appellant's semen.

Appellant's defense consisted of only one witness: Sheila Richards, C.S.'s guardian at the time of trial. Richards testified about a conversation she had with C.S. about two weeks after the incident in question. Richards said that C.S. talked of having "set him [appellant] up" and gave a different explanation for the origin of the semen sample.

After the defense rested, the trial court found appellant guilty of rape. Appellant appeals from this conviction.

## II.

Appellant contends that the trial court's admission of C.S.'s preliminary hearing testimony violated his Sixth Amendment right to confront witnesses against him.

In *Crawford v. Washington,* 541 U.S. 36 (2004), the United States Supreme Court recently addressed the conditions necessary, under the Sixth Amendment's Confrontation Clause, for the admission at trial of "testimonial" evidence given outside of trial. The Court held that two conditions were necessary to satisfy constitutional demands: the unavailability of the witness and the defendant's prior opportunity to cross-examine the witness. *Id.* at 68. Although stated in dicta, *Crawford* clearly considers preliminary hearing testimony to be "testimonial." *Id.* For preliminary hearing testimony to be admissible, then, it must meet *Crawford's* dual requirements of unavailability and opportunity for cross-examination.

More specifically, the Virginia Supreme Court has stated:

> The preliminary hearing testimony of a witness who is absent at a subsequent criminal trial may be admitted into evidence if the following conditions are satisfied: (1) that the witness is presently unavailable; (2) that the prior testimony of the witness was given under oath (or in a form of affirmation that is legally sufficient); (3) that the prior testimony was accurately recorded or that the person who seeks to relate the testimony of the unavailable witness can state the subject matter of the unavailable witness's testimony with clarity and in detail; and (4) that the party against whom the prior testimony is offered was present, and represented by counsel,

> at the preliminary hearing and was afforded the opportunity of cross-examination when the witness testified at the preliminary hearing.

*Longshore v. Commonwealth,* 260 Va. 3, 3-4, 530 S.E.2d 146, 146 (2000) (citing *Shifflett v. Commonwealth,* 218 Va. 25, 28, 235 S.E.2d 316, 318 (1977)).

Thus, our law regarding the admissibility of preliminary hearing testimony has always required unavailability and an opportunity for cross-examination and complies with the new requirements of *Crawford* without alteration.

Within the test set forth by *Longshore,* appellant challenges only the finding of unavailability.[1]

## III.

We review a trial court's determination that a witness is unavailable in the context of admitting preliminary hearing testimony under an abuse of discretion standard. *Sapp v. Commonwealth,* 263 Va. 415, 423, 559 S.E.2d 645, 649 (2002).

In *Sapp,* the Supreme Court of Virginia set forth the minimum requirements for declaring a witness who is present but unwilling to testify to be unavailable. The party offering the hearsay testimony "must demonstrate a 'sufficient reason'" for the witness' unavailability. *Id.* at 425, 559 S.E.2d at 650 (quoting *Wise Terminal Co. v. McCormick,* 107 Va. 376, 379, 58 S.E. 584, 585 (1907)). The

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[1] At oral argument, appellant admitted that he had a prior opportunity to cross-examine the witness.

trial court must question the witness on why he will not testify. *Id.* The court should at least order the witness to testify, and "[a]lthough use of contempt powers is clearly subject to the discretion of the trial court, a contempt order in response to continued refusal to testify after being ordered to do so should be carefully considered." *Id.*

The Supreme Court found in *Sapp* that the trial court abused its discretion in declaring the witnesses to be unavailable. There, two witnesses refused to testify, citing "maybe one or two verbal threats" and "just hearing talk here and there in the streets." *Id.* at 420-21, 559 S.E.2d at 647-48. The trial court told the two reluctant witnesses that it would not force them to testify despite the vagueness of these threats and even assured one witness that he would not "be put in jail for refusing to testify." *Id.* at 420-21, 559 S.E.2d at 648. Finding the witnesses to be unavailable, the trial court then admitted their preliminary hearing testimony.

The Supreme Court reversed the decision, however, stating that only "[u]pon persistent refusal to testify despite judicial pressures and an order to testify . . . [may] the testimony of a witness [ ] be declared unavailable." *Id.* at 427, 559 S.E.2d at 651. By assuring one witness "that nothing would happen to him as a result of his refusal to testify and that his prior testimony would be utilized," the trial court had removed "any semblance of judicial pressure." *Id.* at 426-27, 559 S.E.2d at 651.

In this instance, the trial court did order C.S. to testify and placed sufficient judicial pressure upon her to justify the decision declaring her unavailable. Before involving the trial court, the Commonwealth's attorney questioned her as to why she did not feel comfortable

testifying and outlined her mental situation resulting in the decision. The Commonwealth reminded her she was under subpoena and made certain she knew the potential consequences of her actions. Appellant argues that because the trial court did not affirm the witness' statement of the potential consequences or independently state the consequences, the witness was improperly declared unavailable. However, we decline to hold that a trial court abuses its discretion in failing to affirm a witness' *correct* understanding of the situation.

The trial court stressed the importance of the proceedings to C.S. and ordered her to testify. After she again refused to testify, the court placed her in the "lockup" while it considered whether to declare her unavailable. After half an hour, the court again attempted to elicit the testimony and again was rebuffed.

Although the trial court declined to use its contempt power, this does not constitute an abuse of discretion under *Sapp*. The trial court met the requirement of *Sapp* when it ordered C.S. to testify. Further, the court placed C.S. in its "lockup" for at least half an hour, probably the strongest step short of contempt the court could take. Moreover, unlike the trial court in *Sapp,* the court here never acted to remove the "judicial pressure" to testify. Specifically, the court did not tell C.S. that it would not force her to testify, assure her she would not be punished if she continued to refuse to testify, or reveal that it could admit her preliminary hearing testimony. Because we will not require a trial court to use its contempt power to compel testimony, neither will we reverse a court when it has taken other reasonable actions to pressure a witness. Here, the trial court never acted to remove the "judicial pressure" that the Supreme Court has emphasized. Thus,

the trial court did not abuse its discretion when it found C.S.'s testimony was unavailable.

## IV.

Having concluded the trial court did not abuse its discretion in finding C.S.'s testimony to be unavailable, we hold the preliminary hearing testimony was properly admitted at trial. Accordingly, we affirm appellant's conviction.

*Affirmed.*

**VIRGINIA: IN THE CIRCUIT COURT**
**OF THE CITY OF VIRGINIA BEACH**

HEARING DATE : 12-03-02
JUDGE : SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs. CASE NO.: CR02-3990
CHRISTOPHER PAUL SCHNEIDER, DEFENDANT
SSN: 089-56-3009
DOB: 07-23-62

INDICTMENT FOR: OFFENSE DATE:
Rape Divers days 4-25-99-4-25-02

Court Reporter: Fiduciary Reporting, Inc.

This day came J. Shirey, attorney for the Commonwealth, the defendant, in person, and L. Cardon, attorney for the defendant.

**NOT GUILTY PLEA**

The defendant plead NOT GUILTY. With the consent of the defendant, concurred in by the court and the attorney for the Commonwealth, the court heard and determined the case without a jury.

The Commonwealth called the victim in this case as its first witness of the presentation of their evidence. The witness having refused to give testimony, was remanded temporarily into the custody of the sheriff. With the witness again refusing to testify, the court took no action and released the witness into the custody of her guardian.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied defendant's motion to strike the Commonwealth's evidence.

The defendant's evidence was presented.

After hearing all the evidence, the Court found the defendant GUILTY of Rape, as charged, in violation of § 18.2-61.

**REFERRAL TO PROBATION**

The Court directed the probation officer of this Court to prepare a presentence report.

The Court continued further proceedings to 02-10-03 for sentencing.

The Clerk shall send a copy of this Order to the:
Probation Office of this Court.
Sheriff of this City.

ENTERED: 12/5/02

/s/ A. Bonwill Shockley
JUDGE

**VIRGINIA: IN THE CIRCUIT COURT**
**OF VIRGINIA BEACH**

HEARING DATE : MAY 28, 2003
JUDGE : SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs
CHRISTOPHER PAUL SCHNEIDER, DEFENDANT
SSN : 089-56-3009
DOB : 07-23-62
SEX : MALE

SENTENCING ORDER – CASE NO.: CR02-3990

Attorney for the Commonwealth: J. Shirey
Attorney for the Defendant: M. Stallings & B. Ziegler
Court Reporter: Fiduciary Reporting, Inc.

The defendant was present and represented by counsel.

On December 3, 2002, the defendant was found GUILTY of the following offense(s):

| OFFENSE (F/M) | DATE | SECTION |
|---|---|---|
| RAPE (F) | DIVERS DAYS FROM 04-25-99 THRU 04-25-02 | 18.2-61 |

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

The Court denied defendant's motion to set aside the verdict and for a new hearing.

The Court reviewed and considered the applicable discretionary sentencing guidelines and made the completed worksheet a part of the record of the case pursuant to the provisions of Code § 192-298.01.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: 25 years.

The Court **SUSPENDS** 13 years of the sentence conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for 25 years.

2. **Supervised Probation.** The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include sexual offender abuse counseling and/or testing as prescribed by the Probation Officer. LENGTH OF PROBATION: Until released by the Probation Officer. PROBATION TO BEGIN: Upon release from confinement.

3. **Other.** The defendant shall register as a Sex Offender.

4. **SOAP.** The defendant shall participate in the Sex Offender Awareness Program (SOAP), if available, while housed at the Virginia Beach Correctional Center; however defendant shall be released from custody upon completion of jail sentence and/or transport to DOC facility.

**Distribution of Copies.** The Clerk shall send a copy of this order to the: Sheriff
Director of the Department of Corrections
Probation Office of this Court

**Payment after release.** $ 805.00 Costs. Payment to be made after defendant's release from confinement.

**Credit provision when time to be served.** The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.

**Substance abuse screening and assessment for felony convictions pursuant to § 18.2-251.01** If the defendant has been convicted of a felony offense, not a capital offense, committed on or after January 1, 2000, the defendant shall complete any substance abuse screening, assessment, testing, and treatment as directed by the Department of Corrections as part of the defendant's sentence. The defendant is subject to payment of all or part of the costs of the program or treatment, excluding the costs of the screening and assessment, based upon the defendant's ability to pay.

**The court recommends that the defendant be screened to serve the active period of incarceration at a DOC facility that provides Sex Offender Treatment.**

ENTERED: 5/30/03

/s/ A. Bonwill Shockley
JUDGE

Clerk: vbh

***VIRGINIA:***

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 1st *day of* August, 2006.

Christopher Paul Schneider, Appellant,

against Record No. 060470
Court of Appeals No. 0628-05-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Virginia Beach shall allow court-appointed counsel the fee set forth below and also counsel's necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorney's fee $950.00 plus costs and expenses

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ Douglas B. Robelen
Deputy Clerk

***VIRGINIA:***

*In the Court of Appeals of Virginia on* Tuesday *the* 7th *day of* February, 2006.

Christopher Paul Schneider, Appellant,

against Record No. 0628-05-1
Circuit Court No. CR02-3990

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Before Judges Elder, Clements and Haley

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed. The appellant shall pay to the Commonwealth of Virginia thirty dollars damages.

It is ordered that the trial court allow counsel for the appellant a fee of $725 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

The Commonwealth shall recover of the appellant the amount paid court-appointed counsel to represent him in this proceeding, counsel's costs and necessary direct out-of-pocket expenses, and the fees and costs to be assessed by the clerk of this Court and the clerk of the trial court.

This order shall be certified to the trial court.

Costs due the Commonwealth by
appellant in Court of Appeals of Virginia:

Attorney's fee $725.00 plus costs and expenses

A Copy,

Teste:

Cynthia J. McCoy, Clerk
By: /s/ Marty Ring
Deputy Clerk